ANG TUN CHEONG

v.

LIM YEOK BENG;
PUBLIC BANK BHD (INTERVENER)

HIGH COURT MALAYA, PENANG
RK NATHAN J
[CIVIL SUIT NO: 22-119-2001]
10 JULY 2002

CIVIL PROCEDURE: *Parties - Addition of new party - Judgment affecting right of non-litigant - Notice regarding suit not served on affected person - Application by non-litigant to intervene - Whether to be allowed - Whether judgment to be set aside - Rules of High Court 1980, O. 15 r. 6(2), O. 19 rr. 5, 6, 7*

The plaintiff and the defendant had entered into a sale and purchase agreement for the sale of a property to the defendant at a price of RM140,000. At the material time, the property was charged to Standard Chartered Bank Malaysia Berhad ('Chartered Bank'), whom the plaintiff owed RM87,001.05. The defendant paid a 10% deposit for the purchase price, and thereafter, to pay the balance sum, obtained a loan from Public Bank Berhad ('Public Bank'), who, upon execution of a charge of the property in its favour, paid the redemption sum of RM87,001.05 to Chartered Bank. The defendant failed to pay the balance sum on the due date, and that being so, the plaintiff applied for and obtained a judgment in default of defence against the defendant, as well as an order to forfeit the deposit and for vacant possession of the property. Public Bank was not informed of the plaintiff's action, and was thus unaware of it, not until it was served with a copy of the default judgment. Having been affected by the default judgment, and to protect its interest, Public Bank hence applied to intervene in the plaintiff's action, to be named as co-defendant therein and set aside the default judgment.

Held:

[1] Although O. 15 r. 6(2) Rules of the High Court 1980 states that an application to intervene may not be made after final judgment has been entered, the right to intervene would be allowed where an applicant has an interest related to the subject matter. In the instant case, a contractual relationship had arisen between the plaintiff and Public Bank, and, by registering the charge in question, Public Bank had obtained an indefeasible interest in the property. (p 32 d-e)

[2] The plaintiff ought to have at least given a notice to Public Bank or at least joined them as co-defendant to the suit. Public Bank had paid the redemption sum to his bank, namely, the Chartered Bank, and had also released the balance sum of RM22,998.95 to him. It was therefore incumbent for the plaintiff to have joined Public Bank as co-defendant instead of surreptitiously only against the defendant chargor. (p 32 e-g)

[3] To prevent injustice to Public Bank, the application to intervene and to be added as co-defendant ought to be allowed. Upon this finding, it is also proper that the judgment in default of defence entered against the defendant be set aside. (p 33 d-e)

[Application allowed.]

Case(s) referred to:
Eon Bank Bhd v. Pang Chong Thai [2001] 5 CLJ 469 HC ***(refd)***
Syarikat Joo Seng & Anor v. Habib Bank Ltd [1986] 2 MLJ 129 ***(refd)***
Wan Salimah Wan Jaffar v. Mahmood Omar [1998] 1 CLJ 480 HC ***(refd)***

Legislation referred to:
National Land Code, s. 340(1)
Rules of the High Court 1980, O. 2 r. 1, O. 15 r. 6(2), O. 19 rr. 5(1), 6, 7(1)

For the plaintiff - A Rajesh Kumar (AK Ang); M/s CG Oh & Ang
For the intervener - CK Cheah; M/s Cheah Choo Kheng & Shamsuddin

Reported by WA Sharif

JUDGMENT

RK Nathan J:

Facts

By way of a sale and purchase agreement dated 24 November 1999 the plaintiff agreed to sell and the defendant agreed to purchase all that piece of land held under H.S.(D) 2817, Lot No. 4514, Mukim 14, Daerah Seberang Perai Selatan, Negeri Pulau Pinang (the said property) at an agreed price of RM140,000 upon the terms and conditions set out in the said agreement. A deposit of RM14,000 was paid to the plaintiff upon execution of the said agreement. The balance of the purchase price was to be paid on or before 24 May 2000. The said property was in the meantime charged to the Standard Chartered Bank Malaysia Berhad (the Chartered Bank) by the plaintiff who owed the said bank at the time of sale to the defendant, a sum of RM87,001.05. To enable the defendant to pay the balance of the purchase price the Public Bank Berhad granted the defendant two loan facilities namely (a) a Housing Loan for RM50,000 and (b) an

overdraft for RM60,000. The defendant then executed two charges in favour of Public Bank Berhad in respect of the said property. Before the charges were registered the plaintiff gave a letter of undertaking dated 15 April 2000 to Public Bank Berhad that he would refund to the said bank the loans released, if the memorandum of transfer could not be registered and/or certificate of fitness for occupation not obtained for whatever reason. Based on the said letter of undertaking Public Bank Berhad released the redemption sum of RM87,001.05 to the Chartered Bank. The two charges were then registered in favour of Public Bank Berhad. In the meantime the plaintiff had given the defendant vacant possession of the said property. Pursuant to the sale and purchase agreement the defendant ought to have paid the balance of the purchase price by 24 May 2000. Since the defendant had failed to pay the balance by that date the plaintiff, through his solicitor's letter dated 26 May 2000, terminated the said sale and purchase agreement and forfeited the deposit of RM14,000. The defendant had however already charged the said property to Public Bank Berhad.

The plaintiff then filed this suit against the defendant and prayed for, *inter alia*:

1) a declaration that the defendant had breached the sale and purchase agreement and that the plaintiff has the right to forfeit the deposit of RM14,000.

2) an order that the deposit be forfeited.

3) an order that the defendant do give vacant possession and other consequential orders.

The defendant entered appearance and filed his defence out of time. The plaintiff then applied (encl. 4) to strike out the defence and to enter judgment for filing the defence out of time. In the meantime the defendant filed an application (encl. 6) to extend time to file the defence. Both applications were then fixed for hearing by the learned senior assistant registrar (SAR) on 29 August 2001. After hearing lengthy submissions the learned SAR dismissed encl. 6 and allowed the plaintiff's encl. 4. The defendant then took out another application (encl. 10) also to set aside the judgment striking out the defence and giving judgment in default of defence. Having filed an appeal against the decision of the learned SAR in respect of both encls. 4 and 6 the defendant applied for a stay of execution (encl. 10A) until the hearing of the appeal by me in chambers. Having heard full arguments the learned Timbalan Pendaftar dismissed encl. 10 with costs but allowed encl. 10A.

On 28 November 2001 having heard submissions from both parties I dismissed the appeals against encls. 4 and 6 with costs.

On 19 March 2002 Public Bank Berhad applied by way of encl. 20 to intervene and to set aside the judgment in default of defence and to add themselves as a party to the action as a 2nd defendant. On 29 April 2002 I heard encl. 20 and allowed Public Bank Berhad to intervene and to be made a 2nd defendant and also set aside the judgment in default of defence dated 29 August 2001. Being dissatisfied with my decision the plaintiff has appealed.

Findings Of The Court

From the facts set out it is clear that the said property has been charged to Public Bank Berhad and that on that basis Public Bank Berhad had released the sum of RM87,001.05 to the Chartered Bank being the sum owned by the plaintiff to the said Chartered Bank. The plaintiff had signed an undertaking with Public Bank Berhad even before the charge was registered. Surely pursuant to this letter of undertaking there has arisen a contractual relationship between the plaintiff and Public Bank Berhad. By registering this charge, Public Bank Berhad had obtained an indefeasible interest in the said property. (See s. 340(1) of the National Land Code (the NLC)). In *Eon Bank Berhad v. Pang Chong Thai* [2001] 5 CLJ 469 I held that although O. 15 r. 6(2) of the Rules of the High Court 1980 (the RHC) states that an application to intervene may not be made after final judgment has been entered. It was my judgment that where an applicant has an interest related to the subject matter, the court would allow him the right to intervene. Similarly in this case the intervener's interest in the said property has been registered. The plaintiff ought to have at least given notice to Public Bank Berhad or at least joined the said bank as a co-defendant to the action. It is not that he had no knowledge of the right of the Public Bank Berhad to intervene. The said bank had paid the redemption sum to his bank (the Chartered Bank) and had also released the balance sum of RM22,998.95 to him. It was therefore incumbent upon the plaintiff to have joined Public Bank Berhad as a co-defendant instead of moving surreptitiously only against the defendant/chargor. In fact in his affidavit in support of encl. 20, the Branch Manager of Public Bank Berhad affirmed that the intervener only knew about the judgment in default of defence, when the bank received a copy of the said judgment from the plaintiff's solicitor on 7 March 2002. It is clear therefore that the plaintiff had deliberately withheld any prior information regarding this matter from Public Bank Berhad and only served it with the judgment, after everything was over. If this mode of circumventing the bank's right is allowed, banks will refuse to lend money and commercial practice will grind to a halt. It also makes a mockery of the National Land Code.

I have checked the court file and note that the plaintiff has not to date extracted a fair order of the judgment of the learned SAR in respect of encl. 4 and encl. 6. Since Prayer (1) of encl. 4 was to strike out the defence the judgment prayed for in para. (2) of encl. 4 is to enter judgment in default of defence. The plaintiff has eight different prayers in his statement of claim and only if there is an order of court can this court ascertain if the plaintiff has complied with O. 19 r. 5(1) or r. 6 or r. 7(1) of the RHC, because it is clear that if the judgment is under O. 19 r. 7, that is, where the defendant fails to file a defence, judgment cannot be entered for the plaintiff until an application is made by summons or motion. (See *Wan Salimah bt. Wan Jaffar v. Mahmood bin Omar* [1998] 1 CLJ 480). It must also be noted that the curative powers of the court under O. 2 r. 1 of the RHC to cure non-compliance with the rules of the High Court do not apply to default judgments or one taken contrary to O. 19 r. 7. (See *Syarikat Joo Seng & Anor. v. Habib Bank Ltd.* [1986] 2 MLJ 129.)

As the principal object of a court is to prevent injustice being done to a party whose rights would be affected by a court's judgment if the court proceeded to hear and determine a matter in dispute without giving that party who will be affected, a right to be heard, I allowed Public Bank Berhad the right to intervene and to be added as a co-defendant. On my findings, I also saw it fit to set aside the judgment in default of defence entered against the defendant.

I awarded costs to be in the cause.